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No. 88-230

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

SAVINGS LEAGUE OF WISCONSIN, LTD., EQUITABLE SAVINGS & LOAN ASSOCIATION, LIBERTY SAVINGS & LOAN ASSOCIATION, and MARATHON COUNTY SAVINGS & LOAN ASSOCIATION

Appellants,

v.

WISCONSIN DEPARTMENT OF REVENUE and W. MICHAEL LEY, as Secretary of the Department of Revenue,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS, DISTRICT IV, OF WISCONSIN

REPLY TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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INTRODUCTORY STATEMENT AS TO CONTENTS OF REPLY BRIEF

As this is a reply brief authorized by Rule 16.5, Rules of the Supreme Court of the United States, Appellants will present herein only direct reply to Appellees' Argument, and will not repeat or reiterate the other portions included as required in Appellants' Jurisdictional Statement.

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I. CONTRARY TO THE APPELLEES' ASSERTION, IT *IS* THE "ECONOMIC EFFECT" OF A TAX STATUTE (AND NOT ITS NOMENCLATURE) THAT DETERMINES ITS VALIDITY

On page 14 of the Appellees' Motion to Dismiss or Affirm (referred to hereinafter as the "Motion"), they state

concisely the essence of their argument, which is that "[t]he economic effect of the [tax] statute has nothing to do with its validity." Instead, they contend, this Court is prohibited from looking "beyond the face of the statute" (Motion, p. 17) and it must therefore continue to recognize the distinction between an "income" tax and a "franchise" tax measured by income, even though that distinction might be "economically meaningless" (Motion, p. 19). It is apparent that the lower courts adopted the same reasoning in reaching their conclusions in this case and this Court is respectfully urged to take the present opportunity to clarify whether this astonishingly formalistic theory of constitutional adjudication has indeed survived into the modern era.

The Appellants rely on *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) in arguing that legislative labels are no longer determinative of the validity of a tax statute but the Appellees contend (Motion, p. 15) that *Complete Auto* does not support "anything nearly like" that proposition. Their analysis of *Complete Auto* is puzzling but, apparently, they are arguing that the *Complete Auto* approach (i.e, ignoring the "particular words" of a statute and focusing instead on its economic effect) is limited to Commerce Clause disputes and that this practical approach does not extend to Supremacy Clause, Borrowing Clause, or 31 U.S.C. §3124 controversies. *Complete Auto*, however, contains no such limitation and, in fact, this Court has analyzed intergovernmental immunities in precisely the same manner. *See, e.g., American Bank and Trust Co., v. Dallas County*, 463 U.S. 855 (1983), invalidating a Texas property tax on bank shares because the tax included in its measure the value of United States obligations owned by the bank; in reaching this conclusion, this Court rejected as "formalistic" the State's argument that, for purposes of the predecessor to 31 U.S.C. §3124, there was a meaningful difference between a tax on corporate shares that included in its measure the value of federal obligations owned by the

corporation and a direct tax on the underlying obligations themselves.

It is of course true that Congress has chosen to exempt bona fide "franchise" taxes from the statutory prohibitions of 31 U.S.C. § 3124 meaning that, before reaching the direct question presented in *American Bank*, it is first necessary to determine whether a tax is or is not a true "franchise" tax. The Appellees (and the lower courts herein) apparently argue that this preliminary step *is* still to be analyzed solely in terms of the label affixed to the tax, meaning presumably that Texas could now avoid the result in *American Bank* by merely relabeling its bank share tax as a "franchise" tax.[1] Perhaps such an emphasis on semantics is statutorily unavoidable with respect to a tax based on the value of corporate assets[2] but, especially in view of *Complete Auto*, it is surely an outmoded and inappropriate method of analyzing what is purely and simply a renamed (and misnamed) income tax.

In summary, this case presents the Court with a significant opportunity to clarify whether, despite *Complete Auto*, *American Bank* and their progeny, there still remains a protected oasis of formalism and semantics in a constitutional area from which so much of this outmoded underbrush has been recently cleared.

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[1] Just as Wisconsin relabeled its corporate "income" tax as a "franchise" tax.

[2] This Court noted in *American Bank* that true "franchise" taxes customarily assess the franchise "at the value of the assets of the business." 463 U.S. at 863, n. 6.

II. THE APPELLEES ARE IN ERROR WHEN THEY CLAIM THAT THIS COURT HAS OVERRULED ITS EARLIER DECISIONS TO THE EFFECT THAT A STATE TAX CAN BE INVALIDATED IF ADOPTED FOR AN IMPROPER PURPOSE

In Appellants' Jurisdictional Statement, it was contended that, under *Macallen v. Massachusetts*, 279 U.S. 620 (1929), the Wisconsin "franchise" tax imposed by Wis. Stat. §71.01(2) should be invalidated because it was adopted for the sole purpose of taxing income from federal obligations. Appellees respond (Motion, pp. 8-13) with a discussion of later cases in which *Macallen* was distinguished on its facts but they ignore the crucial point that this Court has always been careful *not* to overrule *Macallen*. Appellees also contend (Motion, p. 13) that *Macallen* has been held by this Court to be "no longer [of] precedential value" but the cases cited for that proposition (*Phillips Chemical Co. v. Dumas Ind. Sch. Dist.*, 361 U.S. 376 (1960) and *Washington v. United States*, 460 U.S. 536 (1983)) do not so hold. Instead, in each of these cases, the focus of the Court was solely on the Court's understanding that *Macallen* required an ostensibly discriminatory state tax to be examined in isolation rather than by reference to the state's overall tax structure; it was this analytic approach that was rejected in *Phillips Chemical* and *Washington v. United States*, not the broader substantive conclusion of *Macallen* that a state tax (such as the Wisconsin "franchise" tax here at issue) enacted solely to reach otherwise tax-exempt income is invalid. *See e.g.*, 460 U.S. at 542. And see also such recent state Supreme Court decisions as *Federal Products Corp. v. Norberg*, 429 A.2d 447 (R.I. 1981), assuming the continued vitality of *Macallen* and relying thereon for its conclusion.

III. THE APPELLEES ARE ALSO WRONG IN CONCLUDING THAT APPELLANTS FAILED TO PROPERLY PRESENT CRUCIAL FACTUAL INFORMATION TO THE LOWER COURTS

The Appellees' final contention (Motion, pp. 24-27) is that, even if the Appellants are correct in their substantive arguments, they have failed to present to the lower courts crucial factual information necessary to support those arguments. These factual "gaps," the Appellees argue, include (i) evidence to demonstrate the purpose of the Wisconsin legislature in enacting a "franchise" tax as a substitute for the long-standing "income" tax and (ii) evidence to demonstrate that the economic effect of the "franchise tax" is the same as the "income tax."

These alleged factual gaps are non-existent. As to the legislative purpose behind the "franchise" tax; this Court stated in *Miller v. Milwaukee*, 272 U.S. 713 (1927) that:

> A result intelligently foreseen and offering the most obvious motive for an act that will bring it about, fairly may be taken to have been a purpose of the act.

Id. at 715. It was demonstrated below that the only difference of substance between Wisconsin's prior "income" tax and the new so-called "franchise" tax was that the new tax reached (or, rather, purported to reach) interest from federal obligations and this "intelligently foreseen" result was surely the "most obvious" legislative purpose behind the enactment of the new tax. Similarly, as to the "economic effect" of the "franchise" tax vis-a-vis the "income" tax, this Court can properly assume, in the absence of *any* substantive difference on the face of the two statutes, that they must of necessity have the same economic impact and Appellees' argument that this self-evident result requires some type of factual demonstration is disingenuous. *See e.g. Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 284 (1977) in which this Court concluded, in analyzing

Railway Express Agency, Inc. v. Virginia, 347 U.S. 359 (1954)("Railway Express I") and *Railway Express Agency, Inc. v. Virginia*, 358 U.S. 434 (1959)("Railway Express II"),[3] that "there was no real economic difference between" a "license" tax levied *on* gross receipts and a "franchise" tax *measured by* gross receipts; this Court did not require any fact-finding to reach this obvious result, and similarly, no fact-finding is required to determine the economic equivalency of an "income" tax and an identically structured "franchise" tax *measured by* income.

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[3] Railway Express I and Railway Express II were discussed in the Appellants' Jurisdictional Statement, at p. 17 n.4.

CONCLUSION

For the reasons stated in the Appellants' Jurisdictional Statement and in this Reply, this Court is respectfully urged to deny the Appellants' Motion to Dismiss or Affirm, to note probable jurisdiction and to set this case for plenary consideration.

Respectfully submitted,

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